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Issue Date: 17 July 2007

CASE NO.: 2006-LHC-1015
OWCP NO.: 06-196304

In the Matter of:

C.G.,
Claimant,

v.

PCL CIVIL CONSTRUCTORS, INC.,
Employer,

and

ZURICH NORTH AMERICA,
Carrier.

Appearances: Robert R. Johnson, Esq.
For the Claimant

Lisa Torron-Bautista, Esq.
For Employer and Carrier

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Claimant is seeking disability compensation and medical benefits for a May 9, 2005 work-related injury which he sustained while working for Employer.

A formal hearing was held in this case on September 21, 2006 in West Palm Beach, Florida at which the parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. Claimant offered exhibits 1 through 23 which were

admitted into evidence.[1] Employer offered exhibits 1 through 10 which were admitted into evidence. ALJX 1 through 3 were marked for identification and admitted into evidence without objection. The parties filed post-hearing briefs.[2] The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. STIPULATIONS

The parties have stipulated (Tr. 5-11, 21-22, 186, ALJX 3) and I find that:

1. The parties are subject to the Act.
2. Claimant and Employer were in an employee-employer relationship at all relevant times.
3. Claimant sustained an injury arising out of and in the course of his employment on May 9, 2005 in Stuart, Martin County, Florida.
4. Timely notice of the injury was given by Claimant to Employer on May 9, 2005.
5. Claimant filed timely a claim for compensation on August 31, 2005.
6. Employer filed a timely notice of controversion with respect to the May 9, 2005 injury.
7. Claimant sustained a disability as a result of the injury.
8. Claimant was paid temporary total disability compensation for 47 weeks from May 10, 2005 to April 4, 2006 at a rate of $526.95 per week for a total of $24,766.65 plus penalties and interest.
9. Claimant was paid further temporary partial disability compensation for his lost wage earning capacity for 22 weeks from April 5, 2006 to September 5, 2006 at a rate of $206.93 per week for a total of $4,552.46 plus penalties and interest.
10. Claimant's average weekly wage at the time of his May 9, 2005 injury was $844.00 resulting in a compensation rate of $562.67.
11. Claimant exercised his first free choice of physicians three times.

[1] The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript. At the hearing, CX 23, which consisted of five job listings from Employer's labor market survey bearing handwritten notes purportedly made by someone with whom Claimant met during his job search in June 2006, was admitted into evidence over Employer's objection. Tr. 80-81, 85-86. Claimant's counsel was instructed at that time to make copies of the five job listings and submit them collectively as CX 23 after the hearing. Tr. 87. Counsel subsequently submitted those five pages as well as listings for 13 other jobs, and I thereafter granted Employer's motion to strike the additional documents by order dated November 6, 2006. The five job listings admitted as evidence and considered herein are found at pp. 121, 124-127 of CX 23 and identified in my November 6, 2006 order granting Employer's motion to strike.

[2] In an order dated December 8, 2006, I further admitted into evidence a "demonstrative" exhibit attached to Claimant's closing brief consisting of a map and driving distances between Kissimmee, Florida and Stuart, Florida. Claimant's counsel subsequently re-submitted a second "demonstrative" exhibit consisting of descriptions of various medications prescribed for Claimant and their potential effect on individuals accompanied by a motion for leave to introduce such evidence for consideration in this case. No response to the motion was ever filed by Employer's counsel, and that exhibit is hereby admitted. Claimant's two supplemental exhibits will be referred to herein as "Claimant's Demonstrative Exhibit 1" and "Claimant's Demonstrative Exhibit 2."

II. ISSUES

The following unresolved issues were presented by the parties:

1. The nature and extent of disability resulting from the May 9, 2005 injury.
2. Whether Claimant is entitled to reimbursement for the costs of certain medical treatment.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant testified that he was born January 14, 1969, was 37 years old on the date of the hearing, and resides in Kissimmee, Florida with his wife and three children. Tr. 56-57. Claimant is from Guatemala and has been working under a valid work permit since 1991. Tr. 57. He attended school in Guatemala for nine years, and worked in Imokalee, Florida picking tomatoes, red peppers, cucumbers, and melons when he first arrived in America. Tr. 57. He then worked in Georgia at cotton packing plants, but returned to Florida in 1991 where he began working in construction. Tr. 58-59. He first worked in the construction of buildings but later started working on bridges which is what he was doing when he was injured while working for PCL. Tr. 59.

Claimant testified that he has a lot of pain as a result of his May 9, 2005 accident. Tr. 61. He experiences pain at the base of his neck/skull, around his eyes, in his low back, left side and into his left leg. *Ibid*. His leg falls asleep, as does his right hand, and he doesn't have any strength in that hand. *Ibid*. According to Claimant, the pain feels like "they are stabbing me with nails," and it is accompanied by itching. Tr. 62. He cannot maintain any set position for too long, whether it is sitting, standing, or laying, because of the pain. *Ibid*.

With respect to his job at PCL on May 9, 2005, Claimant testified that he and his fellow workers traveled by boat to a large metal barge beneath a bridge where scaffolding was erected so they could perform work on the bridge. Tr. 63. When he arrived at the barge, he and his co-workers put on their safety equipment and were told by their supervisor that they would be removing some forms. *Ibid*. His supervisor subsequently told him to remove his safety equipment, but he said no because he had recently spoken with OSHA personnel and was told that any work above six feet required the use of safety equipment. Tr. 64. The only injury he had ever suffered before May 9, 2005 was when he had a "sliver" in his eye while working for Modern Continental. *Ibid*. He has not been able to perform any work since May 9, 2005. *Ibid*.

Claimant first saw Dr. Michael Broom with respect to his injury on November 7, 2005. Tr. 65. Dr. Broom's assistant came into the examination room and asked Claimant what his symptoms were. Tr. 66. Claimant spoke with Dr. Broom about surgery, he showed Claimant a diagram and pictures of where the surgery would be done, and he described the recovery process.

Ibid. Claimant understood that Dr. Broom was recommending he undergo surgery for his work-related injuries, and he signed a consent form for the surgery. *Ibid*.

Dr. David Campbell, an orthopedic surgeon in West Palm Beach, also recommended surgery and physical therapy, and Claimant again signed a consent form for the surgery. Tr. 66-67. Dr. Campbell also recommended that Claimant see a urologist, but Claimant has not been seen by a urologist, nor has he received the physical therapy or surgery Dr. Campbell recommended. *Ibid*.

Dr. Broom recommended that Claimant perform exercises at home but he could not do them because the medication he was on made him sleepy and he had too much pain. Tr. 68. He told Dr. Broom's staff that the home exercise program was not working. *Ibid*. During office visits in December 2005 and March and June 2006, he did not see Dr. Broom and was instead seen by someone named Robert. Tr. 68-69. A March 9, 2006 note from Dr. Broom's office states with respect to Claimant "I have recommended he continue with pain management. We really have nothing further to offer him." Tr. 70. During his visits to Dr. Broom's office, Robert would come into the examination room, sit down in the doctor's chair, stand up and hand Claimant a yellow piece of paper, then leave the office and never ask Claimant how he felt or where he hurt. Tr. 71. Dr. Broom's nurse subsequently told him they had nothing surgically to offer him. Tr. 72.

Claimant saw Dr. Webb at the Florida Spine Institute after he was informed by Dr. Broom's office that they had nothing else to offer him. Tr. 72. A May 2, 2006 request to change doctors from Dr. Broom to the Florida Spine Institute was submitted on his behalf. Tr. 73. His first office visit there was on May 30, 2006, and a June 24, 2006 letter confirmed his request for medical care and treatment there involving cervical facet injections. *Ibid*. He spoke with Dr. Torres about the medical necessity for the cervical facet injections and was told that Zurich had denied authorization for them. *Ibid*. A July 11, 2006 letter confirms Employer's denial of that treatment. *Ibid*. Claimant saw Dr. Webb at the Florida Spine Institute in May and June 2006 and paid them a total of $526.00 Tr. 76. Claimant is still seeking authorization from Employer to change doctors from Dr. Broom to Dr. Webb. *Ibid*. According to Dr. Webb, if the cervical facet injections fail, Claimant should have a diskogram and then surgery. *Ibid*.

Claimant met with Jerry Albert, a vocational specialist, at Employer's request. Tr. 77. His report notes that Claimant had not driven an automobile since his accident but Claimant testified that he has driven twice since then. *Ibid*. Claimant contacted various employers listed in Mr. Albert's report between April and August, 2006. *Ibid*. Employment Resources declined to hire him as a "toll service attendant" because of his physical limitations. Tr. 80. Hilton Disney World at Lake Buena Vista declined to hire him as a "host" for the same reason. Tr. 81. Sheraton Safari in Orlando also did not hire him, and he was told by them that no one had inquired about available jobs and the rate of pay reflected in the report was not correct. Tr. 81-82. He was "disapproved" for a job as "host" at Gaylord Palms Resort in Kissimmee and at Caribe Royale in Orlando. Tr. 82. He was also denied employment at CiCi's Pizza as a "dishwasher," a "busboy," and a "pizza prep person" because of his physical limitations. Tr. 84. He experienced similar results at Embassy Suites Resort. Tr. 85.

Claimant received a letter dated December 9, 2005 from Jeff A. Gray, Employer's District Safety & Loss Prevention Manager, informing him that PCL was willing and able to provide him with light duty work in accordance with the physical restrictions imposed by Dr. Michael Broom on November 7, 2005. Tr. 88; EX 3. Claimant complied with the request in Mr. Gray's letter that he call Bryce Faust, the General Superintendent at the Lyons Bridge Site, about coming back to work. Tr. 89; EX 3. He was told by Mr. Faust that if he did not report to work, he would lose his job. Tr. 89. He subsequently received another letter from PCL about returning to work approximately one week before the hearing. *Ibid*. He took the second letter to Dr. Qureshi to see whether Dr. Qureshi believed Claimant was capable of performing the job described in the letter. Tr. 90. Dr. Qureshi "disapproved it, saying [Claimant] was not capable of performing any type of work." *Ibid*. Claimant is willing to go back to work at some job if the cervical facet injections are successful and make him better. *Ibid*.

On cross-examination, Claimant testified he was previously represented by an attorney named Mario Perez and that Mr. Perez requested Dr. Lichtblau be designated as his first free choice of physicians. Tr. 92. He also acknowledged that he was later represented by an attorney named Ed De Varona and that Mr. De Varona requested in September 2005 that Claimant be allowed to switch treating physicians from Dr. Lichtblau to Dr. Michael Landman. Tr. 92-93. He was examined by Dr. Landman on May 24, 2005 and saw him four times thereafter in June, August and September, 2005. Tr. 94-95. Claimant relocated to central Florida in September 2005 at which time Ed De Varona was still his attorney. Tr. 95. Mr. De Varona requested that Claimant's authorized treating physician be changed again, and that Dr. Michael Broom be designated as his treating physician. *Ibid*. Reports from Dr. Broom's records dated November 7, 2005 through June 8, 2006 reflect "complaints, updates and examinations" which, according to Claimant, are simply made up. Tr. 96. Dr. Broom did recommend updated MRI's of Claimant's cervical and lumbo-sacral spine on March 30, 2006, and he obtained those updated MRI's on April 13, 2006. Tr. 96-97. Dr. Broom never called Claimant to inform him of the results of the MRI's, and those results were not discussed with Claimant during his June 8, 2006 office visit. Tr. 97. He never made any recommendations regarding further treatment. Tr. 98. No one at Dr. Broom's office would speak to him and the yellow piece of paper that he was given just said to return in six months. *Ibid*. He was told to continue seeing Dr. Torres for pain management. *Ibid*. His last visit with Dr. Torres was September 8, 2006. *Ibid*.

Claimant testified that he speaks "a little" English. Tr. 99. He does not understand legal issues and needs an interpreter for that. *Ibid*. His understanding of the English language is limited to his personal information. *Ibid*. His supervisors at PCL did not speak Spanish, but he did not have any problem communicating with them. *Ibid*. He had a "friend" in his group who understood everything and would tell him what to do. Tr. 100. He communicated in English with Jeff Gray, a representative of PCL. *Ibid*.

According to Claimant, he called PCL after he got their December 9, 2005 letter offering him a job and spoke to Bryce. Tr. 101. Claimant explained to Bryce that he had received the letter and asked Bryce whether he was aware of all his physical limitations and all the medication he was taking. *Ibid*. Bryce said he had been told that Claimant was going to go into work but that he would get in touch with the company and call him back. *Ibid*. Claimant's understanding of his physical limitations is that he cannot lift over 30 pounds, cannot squat and cannot twist or

work above his head. Tr. 101-02. He also understands that he is not supposed to drive. Tr. 102. He knows that Dr. Broom has recommended permanent restrictions to avoid repetitive bending, twisting, climbing, lifting over 30 pounds, and avoiding overhead work. *Ibid*. Dr. Torres prescribed medication and told Claimant to follow the directions as far as taking them and driving or not driving. *Ibid*.

Claimant showed each of the employers with whom he spoke the restrictions imposed by Dr. Broom and showed them all the medications he was taking. Tr. 103. Some of the employers did not hire him because they could not verify the information. Tr. 104. He was told on June 6, 2006 by Erica at Hilton Disney World that they would not hire him because of his physical limitations. Tr. 105. He took with him to every job interview the yellow piece of paper given to him by Dr. Broom and the medications that he was taking. Tr. 106. The job at Sheraton Safari as a "room service worker" for which he was not hired required bending and twisting. Tr. 107. He was aware the labor market survey described the requirements of the job as requiring only occasional bending. *Ibid*. The notation with respect to a "host" position at the Caribe Royale in Orlando that "Physical limitations prohibit standing for long periods of time" was not based on any representation by Claimant to the person with whom he spoke that he was limited in his ability to stand. Tr. 108. Claimant testified that he never physically appeared at any of the locations related to the three job offers extended to him by PCL. Tr. 108-09. All these positions were different from the job he was doing when he was injured. Tr. 109.

Claimant testified that he had physical therapy with Dr. Lichtblau for one month since his accident. Tr. 111. He has never had any physical therapy recommended by Dr. Broom. *Ibid*. He has had epidural injections through Dr. Torres but the facet injections they asked for were not accepted. *Ibid*. When he went to Dr. Landman on September 8, 2005, the insurance company was denying all types of treatment and Dr. Landman had to send him back to Dr. Lichtblau because the company was saying his claim was a state claim. Tr. 112. Dr. Webb at the Florida Spine Institute recommended he not do any work. *Ibid*. Claimant has not seen the hand surgeon he was recommended to see, nor has he received the lumbar corset that was prescribed or seen the opthamological or ear, eye, nose and throat consults recommended. Tr. 113. He has not received a right wrist immobilizer or received the cervical surgery to which he consented. *Ibid*. All of those were prescribed by Dr. David R. Campbell. Tr. 113-14.

Jeff Gray

Mr. Gray testified that he is employed by PCL as its District Safety Manager. Tr. 116-17. He is responsible for administering the safety and loss prevention program, he handles site inspections, and also handles injury cases under the LHWCA. Tr. 117. He has been with PCL for 14 years. *Ibid*. In his capacity as District Safety Manager, he spoke with Claimant and had no trouble communicating with him in English. *Ibid*. Mr. Gray does not speak Spanish. *Ibid*. He has spoken to Claimant's supervisors following the injury, neither of whom speak Spanish, and they did not report any concerns about Claimant's lack of understanding instructions or his work duties because of a language barrier. Tr. 118.

Claimant was hired by PCL in March 2005 as a carpenter at around $14.00 or $14.50 per hour. Tr. 119. He worked at PCL until his accident on May 9, 2005. *Ibid*.

Mr. Gray spoke with Claimant after his accident about a job offer as a night escort driver in February 2006. Tr. 119. The job required driving a pickup truck behind or in front of segment haulers from Fort Pierce to Stuart, Florida. *Ibid*. He understood Claimant's work restrictions to be no repetitive bending, twisting, no overhead work, and no lifting over 30 pounds. *Ibid*. Mr. Gray was unaware of any restrictions against driving or prolonged standing or sitting. *Ibid*. The night escort driver position did not implicate any of the restrictions imposed by Dr. Broom. *Ibid*. The heaviest weight Claimant would have to lift in performing the job was about 10 pounds to lift a pair of shackles used to tie down a segment. Tr. 120-21. The job paid $12.00 per hour and required a 40-hour work week. Tr. 121. When Mr. Gray spoke with Claimant about the job, Claimant told him he wanted the job but had to speak with his doctor. *Ibid*. Claimant never contacted him about the job after that conversation. Tr. 122.

Approximately three weeks before the hearing, Mr. Gray contacted Claimant to offer him another job located in the Orlando area. Tr. 122. There was also a job offer in December 2005 conveyed to Claimant in a letter dated December 9, 2005. Tr. 122-23. The December job offer was for a "flagger," which is the person who stops and starts traffic near the Ernest Lyons Bridge where Claimant was working when he was injured. Tr. 123. The physical requirements of the job were standing and holding a stop sign paddle which weighed about a pound and a half. *Ibid*. Mr. Gray was unaware of any response by Claimant to the job offer. Tr. 124. The job offer in September 2006 involved traffic and erosion control duties. *Ibid*. The job required the placement of traffic cones weighing about five pounds, helping with signs, monitoring silt fences, occasionally using a shovel to replace dirt around the bottom of the silt fence, and similar activities. Tr. 125. The job was offered to Claimant because it was in Orlando and near to where he had moved. *Ibid*. To Mr. Gray's knowledge, Claimant did not respond to the job offer. Tr. 126.

On cross-examination, Mr. Gray testified that he spoke with Claimant about the job driving a pickup truck, not Mr. Bryce. Tr. 128. Claimant did not talk to him about the medications he was on. *Ibid*. Mr. Gray had no indication from Claimant or his doctors that he was on any medication. Tr. 129. He did not know Claimant was on pain medication. *Ibid*. The letter relating to the December 9, 2005 job offer directed Claimant to contact Mr. Faust. Tr. 130. To his knowledge, there was no contact with Mr. Faust by Claimant regarding that job. Tr. 131.

Mr. Gray testified that he was not on the job site where Claimant was injured on May 9, 2005. Tr. 133. He was involved, however, in the follow up investigation of the accident the day after Claimant was injured. *Ibid*. The safety officer who was on site at the time of the accident, and who does not speak Spanish, spoke to Claimant before he was air-lifted to the hospital. *Ibid*. He testified:

> We interviewed the superintendent, the foreman. The injury description that [Claimant] gave was fairly accurate, except for the fact that he mentioned the fact that his foreman instructed him not to tie off. That's not true.

Tr. 133.

Jerry Albert

Mr. Albert testified that he is a practicing vocational rehabilitation counselor and has been one for 39 years. Tr. 140. He was retained by Employer/Carrier on February 22, 2006 to conduct a vocational evaluation of Claimant and requested the opportunity to meet with him in a letter to Claimant of that date. *Ibid*. After no response from Claimant was forthcoming, Mr. Albert again wrote to Claimant on April 13, 2006.

Mr. Albert met with Claimant on April 28, 2006 for 2.1 hours. Tr. 141. Claimant was deposed that date, and there was an interpreter present during the deposition as well as the vocational assessment. Tr. 141. Claimant did not communicate with Mr. Albert in English, nor did he indicate whether he could speak English. Tr. 142. Mr. Albert assumed he could not speak English. *Ibid*.

Various tests were administered during the vocational assessment, including the Raven Standard Progressive Matrices and the Bennett Mechanical Comprehension Test. *Ibid*. Claimant went through the first test rather quickly and scored below average. *Ibid*. Mr. Albert was concerned about the validity of the test results because Claimant completed the test so quickly. Tr. 143. Claimant also scored below average on the second test, and Mr. Albert believed he should have scored higher based on his past work experience in construction. *Ibid*.

Mr. Albert originally believed Claimant was a high school graduate and thus listed the toll both operator job in his labor market survey as a possible job, but that job would be negated based on the fact Claimant had only seven grades of education. Tr. 144. He reviewed medical reports of Drs. Broom and Torres which noted Claimant's physical limitations. *Ibid*. Those restrictions had not changed as of a few weeks prior to the hearing to the best of Mr. Albert's knowledge. Tr. 145. In his opinion, Claimant was employable. *Ibid*.

The jobs listed by Mr. Albert in the labor market survey he prepared were "possibilities in pursuing job placement . . . but not exhaustive of the job possibilities for [Claimant]." Tr. 146. A labor market survey for the period 4/1/06 to 4/14/06 was prepared before he met with Claimant and included the toll service attendant position which required a high school education. *Ibid*. Jobs listed in the survey were identified by Mr. Albert by going on the Internet, going to employers' web sites to identify prospective jobs, and then contacting a person in the employer's personnel office or a supervisor to gather information about the job opportunity. Tr. 149. Each job listed in the survey identified the person contacted by Mr. Albert, and each of those persons was informed of Claimant's work restrictions, including the fact that he only spoke Spanish and was taking medications. *Ibid*.

Mr. Albert also sent a list of jobs to Dr. Broom for his review and approval for positions at the Gaylord Palms Resort in Kissimmee, Florida. Tr. 150. The list was prepared after he met with Claimant and he then knew Claimant was not a high school graduate. *Ibid*. Mr. Albert followed up with "a couple" of the employers regarding the July survey to see if Claimant had applied for jobs. Tr. 151. The personnel at the Gaylord Palms Resort told him they were "too busy to check" but said they continued to have openings at that location. *Ibid*.

The next survey was in August, and Mr. Albert again followed up to see if Claimant had applied for jobs. *Ibid*. The manager at Hotties Gourmet in Lake Buena Vista could not find any application filed there by Claimant during the preceding several months and stated there continued to be openings there. Tr. 152. The manager at CiCi's Pizza in Lake Buena Vista said that someone had come in, he spoke English, and he showed the manager "a bunch of physician papers, showing that he could only lift ten pounds," but the manager could not recall the individual's name and did not recall if Claimant submitted an application. *Ibid*.

Mr. Albert provided the results of job searches he conducted in July, August and September to Claimant's attorney. Tr. 153. The salary range identified by him for Claimant based on the jobs approved by Dr. Broom ranged from $276.00 per week at $6.90 an hour up to $320.00 a week at $8.00 an hour. *Ibid*.

On cross-examination, Mr. Albert testified that it was his understanding that Claimant's ability to speak and understand English was minimal. Tr. 156. Mr. Albert did not see medical records from Dr. Webb or Dr. Qureshi, but did see some from Dr. Torres. *Ibid*. He would respect a doctor's opinion that an individual was unable to work. Tr. 157. Claimant testified during his deposition that his medications included Cadience, Hydrocodone, and Tisdaine which he was not familiar with. Tr. 159. From a vocational standpoint, Mr. Albert would not recommend for someone taking Hydrocodone any job involving working at heights, operating dangerous machinery, or making quick judgments, particularly a job involving the safety of the worker or others. Tr. 160.

Medical and Other Evidence

A report of an initial evaluation dated May 17, 2005 by Craig H. Lichtblau, M.D., notes that Claimant was examined that date for complaints of head, rib, right hand, and low back pain as a result of a May 9, 2005 injury. EX 4. The report describes Claimant's accident and resulting complaints, and describes various physical findings including tenderness over the cervical and lumbar spine and limited range of motion in the cervical and lumbar spine. *Ibid*. Dr. Lichtblau's diagnostic impression was: cervical and lumbar myofascial pain syndromes; right hand contusion; left rib contusion; costochondritis; post concussive syndrome; and hemoperitoneum, all secondary to his May 9, 2005 injuries. *Ibid*. He recommended conducting an MRI and x-rays, and placing Claimant on an outpatient physical medicine program for his cervical and lumbar spines to be monitored by a physician. *Ibid*. Dr. Lichtblau prescribed Vicodin, Naprosyn, and Soma, and estimated 4-12 weeks of outpatient treatment before Claimant would regain maximum function. *Ibid*.

A May 23, 2005 follow-up report from Dr. Lichtblau notes the results of the MRI and x-rays, which were within normal limits, and reports the same diagnostic impressions noted in the earlier report. EX 4. He recommended continuation of the physical medicine program and prescribed Percocet in lieu of Vicodin. *Ibid*. The report further states in relevant part:

> This patient has been using this medication as prescribed and is not complaining of any adverse reactions. The patient reports that the use of this medication has had a beneficial effect. The patient reports a decrease in pain symptoms and an

> increase in his physical functional capacity and an improvement in his psychosocial functioning. . . .

Ibid.

A May 24, 2005 report of a "Complex Workman's Comp Evaluation" by Michael A. Landman, D.O., notes that Claimant was seen that date with respect to his May 9, 2005 accident. EX 5. Physical findings were noted, as was an impression of: cervicothoracic somatic dysfunction secondary to strain/sprain injury; cervicogenic headaches; lumbosacral somatic dysfunction secondary to strain/sprain injury; right wrist sprain/contusion; right intraorbital contusion; and chest wall contusion. *Ibid*.

A June 2, 2005 report of a "Followup Workman's Comp Visit" with Dr. Landman notes that Claimant came in earlier than scheduled and was experiencing "a lot of pain in his neck & back." EX 5. The assessment remained the same and Dr. Landman stated that Claimant would be scheduled for an ophthalmology evaluation. *Ibid*. He further noted that Claimant's attorney had been contacted "since currently the Workman's Compensation carrier is denying coverage." *Ibid*.

A Notice of Controversion (LS-207) dated June 8, 2005 and filed by Carrier's counsel states that Claimant does not meet the criteria of situs and status under the Longshore and Harbor Workers' Compensation Act with respect to his May 9, 2005 injury. CX 1.

A June 9, 2005 report of a "Followup Workman's Comp Visit" with Dr. Landman notes Claimant had run out of Percocet issued by the hospital upon discharge and was requesting a prescription for his analgesic. EX 5.

A June 23, 2005 letter from Employer's counsel to Claimant's counsel states that Zurich has agreed to provide Dr. Lichtblau as Claimant's first free choice physician. EX 9.

A June 29, 2005 follow-up report from Dr. Lichtblau notes that Claimant was completing four weeks of outpatient physical therapy with minimal to no improvement. EX 4. Claimant reported increased neck and back pain and problems maintaining an erection. *Ibid*. Dr. Lichtblau informed Claimant that he wanted to obtain an MRI of the cervical and lumbar spine. *Ibid*.

A July 11, 2005 follow-up report from Dr. Lichtblau describes the results of MRI's of the cervical and lumbar spine performed on July 6, 2005. EX 4. Dr. Lichtblau informed Claimant that he had herniated discs in his neck and low back and that he was being referred to Dr. Heldo Gomez for a surgical evaluation. *Ibid*. Dr. Lichtblau increased Claimant's dosage of Percocet and noted that Claimant "has been using this medication as prescribed and is not complaining of any adverse reactions." *Ibid*.

An August 11, 2005 follow-up report from Dr. Lichtblau notes that Claimant came in for a review of his medications. EX 4. He wrote:

> [Claimant] has been taking Percocet 10/650 mg. between four and six pills per day. He is not experiencing any adverse side effects with this medication; however, states that he did have to take this medication more than what was prescribed since it has not entirely been controlling his pain. He describes his pain as between an eight and nine out of 10 on the 1-10 scale for pain. He continues to experience persistent radiating symptoms into his upper and lower extremities. He states he is scheduled to see a spinal surgeon next month for surgical evaluation of his cervical and lumbar spine. He states he feels he is getting progressive [sic] worse. He states he does attempt to participate in stretches and exercises; however, states this aggravates the pain in his neck and low back.

Ibid. Based on the increasing complaints of pain, Dr. Lichtblau provided him with a prescription for Kadian twice a day. *Ibid*. He was advised by Dr. Lichtblau of possible side effects from the Kadian including, *inter alia*, sleepiness, hypotension, dizziness, headaches, and the potential for abuse. *Ibid*.

An August 30, 2005 report of a "Followup Workman's Comp Visit" with Dr. Landman notes that Claimant has completed treatment with Dr. Lichtblau but has not yet been evaluated by ophthalmology. EX 5. He notes that Claimant apparently did not want to return to Dr. Lichtblau but recommended Claimant continue care with him or find a new pain management specialist since Dr. Landman could not prescribe any medications for him at that time. *Ibid*.

An Employee's Claim for Compensation form (LS-203) dated August 31, 2005 and filed by Edward F. De Varona, Claimant's counsel, states:

> Injured worker was on scaffold over floating metal barge doing carpentry work for highway overpass when he was [illegible] by a plywood and knocked 10 feet onto floating metal barge.

CX 2. The form further notes with respect to the May 9, 2005 injury that Claimant sustained a fractured left leg, bruised right thumb, internal injuries, and injuries to his low back, ribs, and head which resulted in "extreme headaches, nausea." *Ibid*. Claimant was treated at St. Mary's Medical Center in West Palm Beach by Dr. Craig Lichtblau, the physician of his choice. *Ibid*.

Claimant was seen on September 2, 2005 for a consultation visit with David Campbell, M.D., of the Palm Beach Orthopaedic Institute. CX 15, EX 4. The report of examination notes that Claimant was seen for complaints of neck and low back pain radiating into the left thigh subsequent to falling over 10 feet off a scaffold onto a steel barge. *Ibid*. Examination findings include, *inter alia*, pain to touch on right hand and reduced hand grip due to pain, reduced range of motion of the cervical and lumbar spine with tenderness, and heel/toe walking resulting in low back pain. *Ibid*. Dr. Campbell's impression was low back and neck discogenic pain, cervical myelopathy and cord compression. *Ibid*. Dr. Campbell is a board-certified orthopedic surgeon whose specialties include trauma to the spine. CX 16.

A letter dated September 8, 2005 from Edward F. De Varona, Claimant's counsel at the time, to Employer's counsel states that Dr. Michael Landman is Claimant's choice as a treating physician. EX 9.

A September 8, 2005 report of a "Followup Workman's Comp Visit" with Dr. Landman notes that Claimant had been discharged from care by Dr. Lichtblau and was requesting an analgesic prescription refill. EX 5. Dr. Landman prescribed 30 mg daily of Kadian, continued Claimant at temporary total disability, and ordered a follow-up visit in 4 weeks to review MRI scans. *Ibid*.

A Claim for Benefits dated September 15, 2005 and filed by Edward F. De Varona, Claimant's counsel, states that Claimant has been unable to return to work since his May 9, 2005 injury and seeks reimbursement in the amount of $363.90 for Dr. Lichtblau's services. CX 2.

In a letter dated September 19, 2005 from Edward F. De Varona to Employer's counsel, Mr. De Varona states that Claimant wishes to treat with Dr. Michael Broom at the Florida Care Center after having relocated to Orlando. EX 9.

An October 20, 2005 report of a "Followup Workman's Comp Visit" with Dr. Landman notes that Claimant has relocated to Orlando and was requesting a change in physician to that location. EX 5. He denied any change in his overall condition. *Ibid*.

A letter dated October 26, 2005 from Zurich to Dr. Michael Broom confirmed a November 7, 2005 appointment of Claimant and notes that medical records requested by Dr. Broom have been enclosed. EX 10.

A report by Michael J. Broom, M.D., of an initial orthopedic evaluation conducted November 7, 2005 notes the following with respect to Claimant's May 9, 2005 accident:

> He has worked [at PCL] about three months. On, 5/9/05, he was on some scaffolding about 9-10 feet above the ground and was actually on a barge at the time. A piece [of] molding hit him and knocked him to the ground. He fell approximately 10 feet down to a steel barge. He initially came under the care of multiple physicians including Dr. Lichtblau, Dr. Miller and Dr. Campbell. He comes for further evaluation.

CX 13. Current symptoms are noted as neck, back, and right-sided head pain, right-sided headaches, and right ear and right hand pain. *Ibid*. Dr. Broom noted that his treatment plan was to avoid surgery and instead implement an active therapy program with instruction in home exercises. *Ibid*. He prescribed Lidoderm, Lodine and Hydrocodone and offered a lumbar epidural steroid injection if there was no improvement after five weeks. *Ibid*. Limitations imposed by Dr. Broom were to avoid repetitive bending, twisting, climbing, overhead work, and lifting over 20 pounds. *Ibid*.

A December 9, 2005 letter from Jeff A. Gray, District Safety & Loss Prevention Manager at PCL to Claimant states that PCL is willing to, and can provide, light duty work in accordance

with the restrictions imposed by Dr. Broom on November 7, 2005. EX 3. The letter states, in relevant part:

> You [sic] duties would be that of a Flagger and possibly some light equipment operation. A standard 40-hour workweek will apply.

Ibid. No wage for the work was specified, and Claimant was instructed to contact Mr. Bryce Faust, the site Superintendent, to establish a start date. *Ibid*. The letter further stated that failure to contact Mr. Faust by December 16, 2005 would be considered by PCL to be an abandonment of his job and a desire to no longer work for PCL. *Ibid*.

A December 15, 2005 note of an office visit with Dr. Broom notes that Claimant "is at MMI [maximum medical improvement] today with a 5% PPI [permanent partial impairment] rating for the cervical spine, 5% for the lumbar spine for a total of 10%." EX 6. The note also lists permanent physical restrictions of avoiding repetitive bending, twisting, climbing, lifting over 30 pounds, and avoiding overhead work. *Ibid*.

Claimant was examined by Dr. Jose A. Torres on December 29, 2005 for initial evaluation regarding low back and neck pain. CX 14, EX 7.[3] His report notes, *inter alia*, the results of a July 6, 2005 MRI read by Dr. David Saks. *Ibid*. Dr. Torres's impression was cervical intervertebral degeneration and myelopathy with cervical radiculitis, myofascial pain syndrome, and occipital neuralgia, as well as lumbar radiculitis and lumbosacral myofascial pain syndrome. *Ibid*. Dr. Torres recommended a medical plan starting with a series of three cervical epidural steroid injections and prescriptions for Baclofen, Kadian, and a 5% Lidoderm patch. *Ibid*.

In a January 13, 2006[4] letter from Dr. Torres to Carrier, Dr. Torres notes that Claimant was then under his care after having been referred by Dr. Michael Broom. EX 7. Dr. Torres states in the letter that he has read Dr. Broom's report and agrees with the physical limitations noted therein as well as Dr. Broom's conclusion that Claimant was at MMI. *Ibid*.

A March 9, 2006 report of an office visit with Dr. Broom notes that Claimant continued to experience ongoing discomfort in his neck and back and that he experienced little benefit from cervical epidurals. CX 13. Pain management was the recommended mode of treatment and, according to Dr. Broom, Claimant remained at MMI. *Ibid*. The report further states: "We really have nothing further to offer him." *Ibid*.

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[3] Claimant was seen again by Dr. Torres for follow up evaluations on January 10, January 26, February 3, March 9, March 13, March 21, April 17, April 27, May 18, June 5, June 15, June 29, July 12, and August 7, 2006. CX 14, EX 7. His treatment records reflect ongoing epidural injections and various medication prescribed by Dr. Torres including Morphine Sulfate Extended Release for a brief period, followed by Kadian, Lidoderm 5% patch, Zanaflex, Tizanidine, Narco, Hydrocodone Bitartrate, Lodine XL, Neurontin, Parafon Forte, Skelaxin, and Narcotinum for various periods. *Ibid*.

[4] Although the date noted in the letter is "2005," the content of the letter refers to treatment on 12/29/2005 and was obviously drafted after that date. In addition, attached to Dr. Torres' letter is a January 12, 2006 letter from Carrier's representative to which Dr. Torres was clearly responding.

A fax cover sheet dated March 22, 2006 from Robert Johnson, Claimant's counsel, to Lisa Torron-Bautista, Employer's counsel, seeks authorization for Claimant to be treated by Dr. Rodriguez pursuant to two attached prescriptions by Dr. Broom dated November 7 and December 15, 2005. CX 11.

A March 28, 2006 letter from Dr. Jose A. Torres states that Claimant has been under his care with respect to work related injuries sustained on May 9, 2005. CX 21. The letter notes, in part, that Claimant is currently undergoing both medication management and invasive pain management, consisting of cervical epidural steroid injections, trigger point injections, and nerve blocks, as part of his treatment. *Ibid.*

A March 30, 2006 report of office visit with Dr. Broom states that Claimant was referred back to him by Dr. Torres for increasing pain in his neck, back, left leg and right arm and that epidurals had provided minimal relief. CX 13. Kadian, according to the report, provided some relief of pain. *Ibid.* Dr. Broom recommended updated MRI's of the cervical and lumbar spine to see if surgical intervention was an option and again stated that Claimant had reached MMI. *Ibid.*

A Direct Labor Market Survey Report for the period April 1 to April 14, 2006 prepared by Jerry Albert at Employer's request notes a job opening as "toll service attendant" at Employment Resources in Orlando, Florida, job openings at Hilton Disney World in lake Buena Vista, Florida for a "towers attendant" and "host," an opening as a "host" at Sunset Sam's at the Gaylord Palms Resort in Kissimmee, Florida, an opening as a "host" at Caribe Royale Orlando, and an opening for a "room service worker" at the Sheraton Safari in Orlando, Florida. EX 2.

An April 13, 2006 report of a cervical MRI by Dr. Broom notes: a protrusion which was likely osteophytic centrally and to the left at C3-4; mild central osteophyte formation at C4-5 with mild to moderate right foraminal narrowing; a mild bulge, likely osteophytic at C6-7 with no compression of the neural elements; and some degree of congenital canal narrowing through the midportion of the cervical spine with no significant compression of the neural elements. CX 13; *see also* EX 6 (MRI interpretation by Marc D. Shapiro, M.D.). A report of a lumbar MRI of the same date notes: a mild bulge, protrusion at L5-S1 centrally and somewhat eccentric to the right, with the disc protrusion contacting the right S1 nerve root with no compression or displacement of the nerve root; central protrusion at L5, slight eccentric to the left which could be contributing to some degree of left lateral recess narrowing with the nerve roots appearing to be laterally situated within the spinal canal at L4-5; minimal slight desiccation at L3-4, L4-5 and L5-S1; and no significant and definitive compression of the neural elements noted through the lumbar spine. *Ibid.*

An April 29, 2006 vocational evaluation report was prepared at Employer's request by Jerry G. Albert, a Certified Vocational Evaluation Specialist. EX 1. The report notes that Mr. Albert attended the April 28, 2006 deposition of Claimant and that Mr. Albert thereafter subjected Claimant to certain vocational testing utilizing the interpreter who was present during the deposition. *Ibid.* Mr. Albert's report described Claimant's May 9, 2005 injury and subsequent medical treatment, physical limitations described by Claimant resulting from his accident, and Claimant's activities of daily living. *Ibid.* Mr. Albert further noted various

medications taken by Claimant, described his educational and vocational history, and set forth the results of the vocational testing administered during the evaluation. *Ibid*. Based on his evaluation, Mr. Albert concluded that Claimant could perform a variety of jobs including, *inter alia*, "silk-screen operator," "motion picture projectionist," "flagger," toy assembler" and production assembler." *Ibid*.

A fax cover sheet dated May 2, 2006 from Robert Johnson, Claimant's counsel, to Lisa Torron-Bautista, Employer's counsel, notes that Claimant "has lost confidence in Broom MD" and seeks authorization for a change of medical providers to Anthony P. Moreno, M.D., an orthopedic spine surgeon at the Florida Spine Institute in Clearwater, Florida. CX 3.

In response to an inquiry from Employer's counsel, Dr. Broom stated on May 4, 2006 that Claimant's treatment, from an orthopedic standpoint, was palliative rather than remedial and that Claimant was "still at MMI." EX 6.

An examination report dated May 30, 2006 authored by Scott A. Webb, D.O., of the Florida Spine Institute notes that Claimant was examined that date at 9:51 a.m. CX 4. Findings from an April 13, 2006 MRI and a May 30, 2006 radiographic examination were noted. Under the heading "Assessment & Plan," Dr. Webb wrote:

> We had a lengthy discussion with [Claimant] regarding his clinical, physical exam, radiographic, and MRI findings. We discussed both conservative and surgical treatment options. He does have discogenic related [low back pain].
>
> He had seen Dr. Broom in March who recommended additional physical therapy as well as evaluation for his erective dysfunction. Dr. Broom's recommendations are quite appropriate based on our examination today and we agree with a trial of PT. We did give him a prescription for this and feel workmen's comp should be agreeable to covering this. He would also benefit from a urological evaluation for his ED. All these issues per his history appear to be the result of his accident.
>
> If he were to fail this, the next step would be a discogram to evaluate which level or levels are generating the majority of his pain. His symptoms may improve with additional conservative care (PT). If no improvement is seen with this, he may at some point require surgical fusion.
>
> He will continue his care with Dr. Torres for pain management. We are available at any time for additional opinion. If he would like to pursue additional care with us, he will contact us on a prn basis.

Id. at 3. Dr. Webb's curriculum vitae notes, *inter alia*, that he is board-certified in orthopedic surgery. CX 8.

A fax cover sheet dated June 1, 2006 from Robert Johnson, Claimant's counsel, to Lisa Torron-Bautista, Employer's counsel, notes that he is seeking reimbursement for $250.00 in

medical expenses from the Florida Spine Institute and automobile mileage, and is also seeking authorization for treatment by Dr. Webb. CX 5.

Handwritten notes dated June 5 and 6, 2006 on five job listings from "Employer's Direct Labor Market Survey Report" reflect that Claimant applied for and was turned down for jobs as a "toll service attendant," "host," and "room service worker." CX 23 at 121, 124-27. The handwritten note on the "toll service attendant" job listing refers to an attached job description which states that applicants must have a high school diploma or GED. *Id*. at 121. The handwritten note on the "host" job listing at Hilton Disney World simply states that Claimant filled out an employment application on June 6, 2006. *Id*. at 124. The note on the "host-Sunset Sams" job listing at Gaylord Palms Resort states that the applicant "needs customer service exp." *Id*. at 125. A note on the "host" job listing at Caribe Royal Orlando states "[p]hysical limitations prohibits [sic] standing for long periods of time." *Id.* at 126. Finally, the note on the "room service worker" job listing at Sheraton Safari states "[p]osition required bending/twisting." *Id.* at 127.

A June 8, 2006 report of an office visit with Dr. Broom notes that Claimant had ongoing pain with ongoing permanent limitations to avoid repetitive bending, twisting, climbing, lifting over 30 pounds and avoiding overhead work. CX 13. The MRI results were reviewed with Claimant, and there was a recommendation that he avoid surgery and continue with pain management. *Ibid*. The report further states: "We have nothing further to offer him surgically. We will see him back in 6 months or as needed." *Ibid*.

A report of examination dated June 12, 2006 notes that Claimant was examined by Scott A. Webb, D.O. that date at 2:28 p.m. CX 9, CX 18. In addition to the results of the April 13, 2006 MRI, results from a June 12, 2006 x-ray of the cervical spine were listed noting no evidence of fracture, subluxation, instability or significant degenerative changes. Decreased cervical lordosis with limited motion on extension was noted. Under "Assessment & Plan," Dr. Webb wrote:

> Had a long discussion with the pt regarding options including doing nothing, further conservative tx, pain management, or surgical intervention. At this point I believe he may have predominantly facetogenic pain with a myofascial component, based on his physical exam. He most likely has other contributing factors, however, including multi-level DDD and disc/osteophyte complexes, that are contributing to his neck pain, which is his main complaint. He may ultimately be a candidate for surgical intervention, although cervical discograms would most likely be needed first. At this time he will follow-up with his pain management physician, Dr. Torres, for cervical facet injections for both diagnostic and therapeutic purposes. He certainly is exhibiting no signs or symptoms of myelopathy, and has relatively mild radicular symptoms. I, therefore, discussed with him today that surgical intervention for primarily axial neck pain is difficult to prognose, and should be a last resort only after exhausting conservative treatment. His complaints appear to be the result of his accident. We will see him on a prn basis.

Id. at 2.

A "Return to Work/School Release" form dated June 12, 2006 and signed by Joseph P. Henson, PA-C, notes that Claimant "[c]annot return to work until follow-up with Dr. Torres." CX 6.

A letter dated June 24, 2006 from Robert Johnson, Claimant's counsel, to Lisa Torron-Bautista, Employer's counsel, seeks authorization for Dr. Torres to provide cervical facet injections. CX 6. A letter dated July 11, 2006 to Dr. Torres from Zurich notes that the request for cervical facet joint injections was not "certified" based on the clinical information provided.

On June 24, 2006, Dr. Torres responded to an inquiry from Employer's counsel that, from a pain management standpoint, future treatment received by Claimant would be palliative rather than remedial in nature and would consist of medication management and possibly facet joint injections to help decrease pain. EX 7.

A July 25, 2006 one-page letter on the letterhead of Imtiaz Qureshi, M.D., addressed "To whom it may concern" and signed by Mr. Ruben Perez, states:

> Today I evaluated [Claimant]. He is a 37 year old male who at May 9, 2005 suffered several injuries at work. Patient fell down from a 10 feet high heating [sic] is [sic] back on iron structure. He was unconsciousness [sic] and was transported via helicopter to San [sic] Mary Hospital in West Palm Beach. Were [sic] he was admitted and treated. MRI studies have reveled [sic] multiple trauma and injuries on his spinal and cord. There is an enough evidence of both clinical and diagnostic of disc herniation at different levels of his spine indicated including both his cervical and lumbar-sacral spine. [Claimant] has been injured at work. He remains disabled. He is unable to work. He needs and will benefit from both neurologist and neuron [sic] surged [sic] evaluation.

CX 12.

A Direct Labor Market Survey Report for July 24, 2006 prepared by Jerry Albert at Employer's request notes five job openings at Gaylord Palms Resort in Kissimmee, Florida for "kitchen steward-dishwasher," "housekeeper," "lobby cleaner," "host," and "house attendant."

A Direct Labor Market Survey Report for the period August 1 to August 16, 2006 prepared by Jerry Albert at Employer's request notes job openings for a "donut assembler" at Hotties Gourmet Donuts in Lake Buena Vista, Florida, for a "dishwasher" and "busboy" at Cici's Pizza in Lake Buena Vista, Florida, and for a "lobby attendant," "busperson," and "houseperson" at Embassy Suites Resort in Orlando, Florida. EX 2.

A "Return to Work/School Release" form dated August 3, 2006 signed by Alphonso Fontaine, DHSc, PA-C of the Florida Spine Institute notes that Claimant "[c]annot return to work until follow up with Dr. Broom." CX 10.

An August 16, 2006 letter from Jerry G. Albert to "Heather" at Hotties Gourmet Donuts states that Mr. Albert will be referring Claimant to Heather for a job opening as "doughnut assembler" based on Heather's willingness to hire a person who can only speak Spanish. EX 2.

Handwritten notes on Employer's Direct Labor Market Survey Report dated August 10, 23, 26, 27, and 28, 2006 show that Claimant was denied jobs as a "kitchen steward-dishwasher," "housekeeper," "lobby cleaner," "host," "house attendant," "donut assembler," "dishwasher," "busboy," and "pizza prep person." CX 23. Jobs at Gaylord Palms Resort in Kissimmee were denied because Claimant "can not meet physical restriction of job." *Ibid*. A job at Hotties Gourmet Donuts was denied because "current medical conditions do not allow further consideration." *Ibid*. Jobs at Cici's Pizza as "dishwasher" and "busboy" were denied because Claimant "can't stand for more than 30 minutes per doctors orders." *Ibid*. A job as a "pizza prep person" at Cici's Pizza was denied because "applicant says can't lift 30 lbs per doctors orders." *Ibid*. Two jobs at Embassy Suites Resort in Orlando were denied because, according to the handwritten notations, no one ever contacted the hotel to obtain information on the position and the job descriptions were inaccurate, while a third position at that facility was no longer available. *Ibid*.

A Direct Labor Market Survey Report for August 30, 2006 prepared by Jerry Albert at Employer's request notes three job opening at Gaylord Palms Resort in Kissimmee, Florida for "housekeeper," "food and beverage cashier," and "server assistant." EX 2.

Steven E. Weber, D.O., performed an independent medical examination of Claimant on August 31, 2006. CX 22. His report of that examination describes various medical records and diagnostic test results reviewed by Dr. Weber relating to Claimant's May 9, 2005 accident and notes his physical examination findings with respect to Claimant. *Ibid*. Based on his record review and examination, he concluded that Claimant suffered from cervical disc disease with mild intermittent radicular symptoms and lumbar disc disease. *Ibid*. He recommended treatment with epidural injections of the cervical spine and advised against surgery. *Ibid*. Dr. Weber further wrote:

> I believe that [Claimant] is approaching maximum medical improvement. It may be reasonable for a 3% impairment rating for the cervical spine as well as a 5% impairment rating for the lumbar spine for a total of 8% impairment.

Ibid.

A September 11, 2006 letter from Jeff A. Gray, District Safety & Loss Prevention Manager at PCL addressed to Claimant states that PCL can provide Claimant with light duty work in accordance with the restrictions imposed by Dr. Broom on December 15, 2005. EX 3. The letter states, in relevant part:

> Your duties would be to assist with maintenance of traffic, (MOT) and help our erosion control team. No heavy lifting, repetitive bending, twisting, climbing or overhead work is involved. This work is carried out on both a day and night shift.

> Your rate of pay will be $10.00 per hour. A standard 40-hour workweek will apply. This project is scheduled to be completed in 2008.

Ibid. Claimant was instructed to contact Mr. Jeff deKorver, the site Superintendent, to establish a start date as soon as possible. *Ibid*.

A September 12, 2006 one-page letter addressed "To whom it may concern" on the letterhead of Imtiaz Qureshi, M.D., states:

> [Claimant] was seen in the office again on 08/31/06. Patient still suffering from back pain after fall of work patient has also been seen by orthopedic surgeon who has recommended physical therapy and injection however patient did not receive injection as he could not afford. He has failed physical therapy. He has been recommended surgery on lumber [sic] spine by orthopedic. I agree that patient will benefit from procedure as he as [sic] also been sulfuring [sic] with pain for several months. I believe because of persistent pain he is not able to wok [sic] in any position, as that might aggravate his condition. Please call my office if you have any question.

CX 19. A "Practitioner Profile" from the Internet states that Dr. Qureshi is board-certified in internal medicine. *Ibid*.

A Direct Labor Market Survey Report for September 18, 2006 prepared by Jerry Albert at Employer's request notes two job openings for a "housekeeper" available that date at the Hyatt Regency Grand Cypress in Orlando. EX 2.

Payment records from Zurich (EX 7) reflect the following payments to Claimant:

Temporary partial disability compensation at a rate of $413.86 every 2 weeks from 4/13/06 through 8/23/06.

Temporary total disability compensation at a rate of $1,053.90 ever 2 weeks from 6/23/05 through 3/22/06.

Reimbursement for medical expenses for treatment and medication in varying amounts from 5/11/05 through 8/7/06.

IV. DISCUSSION

Nature and Extent of Injury

Claimant and Employer/Carrier agree that Claimant suffered a work-related injury on May 9, 2005 in Stuart, Florida, arising out of and in the course of his employment with PCL, at which time Zurich was the responsible carrier. The parties have also stipulated that Claimant's work-related injury resulted in disability and that Claimant's average weekly wage at the time was $844.00. The parties have further stipulated that Claimant was paid temporary total

disability compensation for 47 weeks from May 10, 2005 to April 4, 2006 at a rate of $526.95 per week for a total of $24,766.65 plus penalties and interest, and temporary partial disability compensation for 22 weeks from April 5, 2006 to September 5, 2006 at a rate of $206.93 per week for a total of $4,552.46 plus penalties and interest. What they do not agree on is the nature and extent of Claimant's disability, and his entitlement to disability compensation beyond that which has already been paid by Employer/Carrier.

Nature of Disability

Disability is defined under the LHWCA as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disabilities may be temporary or permanent, partial or total. A disability becomes permanent when the employee's condition reaches maximum medical improvement ("MMI"). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). The date of MMI is a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60; *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135, 137 (1984); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000, 1003 (1979).

Claimant asserts that he has not yet reached MMI and that he has remained temporarily and totally disabled since his May 9, 2005 accident. He relies primarily on statements by Drs. Weber, Webb, and Qureshi in support of this assertion. *See* Claimant's Closing Brief at pp. 11-14.

Claimant was seen by Dr. Weber on only one occasion for purposes of an independent medical evaluation. In his IME report dated August 31, 2006, Dr. Weber states, in relevant part:

> [Claimant] is approaching maximum medical improvement. It may be reasonable for a 3% impairment rating for the cervical spine as well as a 5% impairment rating for the lumbar spine for a total of 8% impairment.

CX 22 at 121. His report further states, however, that "surgery is not indicated" and "it may be reasonable to treat [Claimant] with epidural injections of the cervical spine for his intermittent radicular symptoms." *Ibid.*

Although a recommendation for surgery at some point in the future may militate against a finding of permanency,[5] the mere possibility of future surgery does not preclude a finding that the condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and

[5] *See, e.g., Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983) (where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated).

ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. *Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984), *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985).

In this case, Dr. Weber clearly stated that surgery is *not* recommended, that Claimant had sustained a 3 percent impairment of his cervical spine, and that he had a 5 percent impairment of his lumbar spine for a total 8 percent impairment rating. With respect to further treatment, Dr. Weber simply stated that it would be reasonable to provide epidural injections for Claimant's intermittent symptoms. Both Drs. Broom and Torres agree that epidural injections are appropriate, but they further note that such treatment is *palliative* rather than remedial. EX 6, EX 7. Based on the foregoing, I find that Dr. Weber's opinion does not show that Claimant has not yet reached MMI.

In a May 30, 2006 report of examination, Dr. Webb wrote, in relevant part:

> [Claimant] had seen Dr. Broom in March who recommended additional physical therapy as well as evaluation for his erectile dysfunction. Dr. Broom's recommendations are quite appropriate based on our examination today and we agree with a trial of PT. . . .
>
> If he were to fail this, the next step would be a discogram to evaluate which level or levels are generating the majority of his pain. His symptoms may improve with additional conservative care (PT). If no improvement is seen with this, he may at some point require surgical fusion.

CX 4 at 10.

Dr. Webb's statements that Claimant "may at some point require surgical fusion" and that he will benefit from physical therapy, like those of Dr. Weber, do not preclude a finding that Claimant has reached MMI. *Worthington, supra*, 18 BRBS at 202.

Dr. Qureshi's opinion with respect to Claimant's condition is even less compelling than those of Drs. Webb and Weber. A one-paragraph letter dated July 25, 2006, signed by an individual in Dr. Qureshi's office whose medical qualifications, if any, are unknown, does not say anything with regard to whether Claimant's condition is temporary or permanent. EX 12. A one-paragraph letter dated September 12, 2006 signed by Dr. Qureshi incorrectly states that Claimant "has been recommended surgery on lumber [sic] spine by orthopedic" and further states that he "agree[s] that patient will benefit from procedure . . . ." EX 19. I find these erroneous and conclusory opinions entitled to little weight.

In contrast to the above-referenced evidence, Drs. Broom and Torres concluded, based on their physical examinations and treatment of Claimant, and their review of his test results, that he had reached MMI. Dr. Broom treated Claimant between November 7, 2005 and June 8, 2006, and Dr. Torres treated Claimant between December 29, 2005 and September 8, 2006. On

December 15, 2005, Dr. Broom wrote that Claimant "is at MMI today with a 5% PPI rating for the cervical spine, [and] 5% for the lumbar spine for a total of 10%." EX 6. He reaffirmed that conclusion on March 9, 2006, March 30, 2006, May 4, 2006, and June 8, 2006. CX 13. Dr. Torres concurred in Dr. Broom's assessment of Claimant's condition in letters dated January 13, 2006 and June 19, 2006. EX 7. In addition, as noted above, both physicians expressly stated that ongoing treatment for Claimant's spinal condition was palliative rather than remedial in nature. EX 6, EX 7. Given their familiarity with Claimant's medical condition based on their treatment of Claimant during the times noted above, I find their opinions are documented, well reasoned, and entitled to substantial weight. I thus further find these opinions outweigh any contrary evidence of record on the issue of MMI and that Claimant's disability became permanent on December 15, 2005.

Extent of Disability

To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988); *Elliot v. C & P Tel. Co*., 16 BRBS 89 (1984). If the claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 BRBS 171 (1986). The burden then shifts to employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

Claimant has testified, and the evidence of record confirms, that he can no longer perform his prior duties as a marine carpenter at PCL because of the work-related injuries he suffered on May 9, 2005. *See, e.g.*, Tr. 64, 137, CX 13, EX 2, EX 7. He has thus established a *prima facie* case of total disability, and Employer must therefore establish the availability of suitable alternative employment.

To meet its burden of showing the availability of suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59 (3d Cir. 1979); *Queen v. Ceres Marine Terminals*, 39 BRBS 2 (2004). For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988); *Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Rieche v. Tracor Marine*, 16 BRBS 272 (1984); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980). Although there is no mileage limitation specified in the Act, the Board has found that jobs at distances of 65 and 100 miles are too remote to be considered "within the geographical area." *See Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

In support of its contention that suitable alternative employment is available to Claimant, Employer relies, in part, on the testimony and correspondence of Jeff Gray, PCL's District Safety Manager. Mr. Gray testified that he communicated three specific job offers to Claimant after his May 9, 2005 accident. As explained below, I find that only one of these jobs was realistically available to Claimant.

With respect to the first job offer by Employer, Jeff Gray testified that he contacted Claimant in December 2005 regarding an available job as a "flagger." Tr. 122-23. Correspondence dated December 9, 2005 from Mr. Gray to Claimant notes that PCL was then willing and able to provide light duty work at PCL's Ernest Lyons Bridge Project consistent with the physical restrictions described by Dr. Broom on November 7, 2005. EX 3. The Earnest Lyons Bridge Project is where Claimant was working on May 9, 2005 when he was injured and is located in Stuart, Florida.[6] The December 9, 2005 letter to Claimant does not specify any wage for the "flagger" position, nor did Mr. Gray testify that he discussed with Claimant what the rate of pay would be for that position. Inasmuch as Stuart, Florida is approximately 126 miles from Kissimmee, Florida,[7] where Claimant was then residing, and because Mr. Gray never specified any rate of pay for the job, I find that Employer has failed to establish the precise nature and terms of the job, or that this position was realistically available to Claimant within the geographical area where he was then residing.

Although the second job offer by Mr. Gray to Claimant in February 2006 specified a rate of pay of $12.00 per hour for a position as "night escort driver," this position would have required Claimant to drive a pick-up truck while leading or following "segment haulers from Ft. Pierce to Stuart where the job site was." Tr. 119-20. Since both Ft. Pierce and Stuart, Florida are more than 100 miles from Claimant's residence in Kissimmee, Florida,[8] I find that this job was not realistically available to Claimant within the geographical area where he resided.

The third and final job offer extended to Claimant by Mr. Gray involved light duty work handling traffic and erosion control at a job site in Orlando, Florida. Tr. 124-25. The September 11, 2006 letter communicating this offer to Claimant notes a rate of pay of $10.00 per hour and states that the job involves a standard 40-hour work week. EX 3. Claimant did not respond to the job offer. Tr. 126. Inasmuch as Employer has shown that the job was reasonably available to Claimant within the geographical area where he resided,[9] the only remaining question is whether Claimant was capable of performing this job, considering his age, education, work experience, and physical restrictions.

Mr. Gray described the job as follows: "[H]e would help the MOT crew which is maintenance and traffic, and erosion control, which is the checking of perimeter storm controls,

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[6] Mr. Gray testified: "We have the Ernest Lyons Bridge, which is the bridge where [Claimant] was injured, ..." Tr. 123. He further testified: "He worked in Stuart. And he lived in Kissimmee." Tr. 132. Mr. Gray did not know where Claimant was living at the time he was injured. Tr. 132-33.

[7] *See* Claimant's Demonstrative Exhibit 1.

[8] *See* http://www.mapquest.com/directions reflecting a total estimated driving distance of 103.54 miles from Kissimmee, Florida to Ft. Pierce, Florida; *see also* Claimant's Demonstrative Exhibit 1.

[9] *See* http://www.mapquest.com/directions reflecting a total estimated driving distance of 22.41 miles from Kissimmee, Florida to Orlando, Florida. I find the location of this job was reasonably proximate to Claimant's residence when the offer was made.

silt fence, that type of thing." Tr. 124-25. He further testified, with respect to the physical requirements of the job, that it would involve

> setting out of cones, traffic cones which probably weigh maybe five pounds, helping with signs, detours, that kind of stuff. Erosion control would basically be monitoring silt fence. There may be a requirement to use a shovel to replace some dirt around the bottom of the silt fence on occasion. But it's more of a walking, checking type of operation.

Tr. 125.

By the time PCL extended the above-referenced offer of employment in Orlando to Claimant, both Drs. Broom and Torres were in agreement that Claimant was capable of working with certain restrictions. *See, e.g.*, EX 6, EX 7. Claimant asserts, however, that the restrictions imposed by Drs. Broom and Torres do not accurately reflect the level of his impairment, and he argues that other evidence of record shows he is incapable of engaging in any gainful employment.

Claimant relies in large part on the opinions of Dr. Imtiaz Qureshi and Dr. Webb as evidence that he is incapable of working. As noted above, the record contains two "opinion" letters from the office of Dr. Qureshi, as well as records from the Florida Spine Institute reflecting, *inter alia*, that Claimant was seen by Dr. Webb on May 30, 2006 and June 12, 2006. Claimant also testified that his medication makes him sleepy, he continues to experience substantial pain as a result of his May 9, 2005 injuries, that he cannot sit, stand, or lay down for any extended period of time, and that he "can't do anything [because of] this pain." Tr. 61-62, 103. Each of these contentions is addressed below.

With regard to Claimant's reliance on the conclusory opinion of Dr. Qureshi found in the one-paragraph letter dated September 12, 2006, that letter is devoid of any explanation, rationale, or reference to objective findings which might support his statement that Claimant cannot work.[10] CX 19. Indeed, the letter erroneously states that Claimant has been recommended for spine surgery. *Ibid*. Contrary to Dr. Qureshi's statements, Dr. Broom expressly recommended against surgery when he conducted an initial orthopedic evaluation of Claimant on November 7, 2005. CX 13. Similarly, in a June 8, 2006 treatment note, Dr. Broom continued to recommend that Claimant avoid surgery and that he instead continue with pain management. CX 13. Dr. Webb, who initially saw Claimant on May 30, 2006, expressly agreed with Dr. Broom's recommendation of physical therapy and subsequently wrote, on June 12, 2006, that Claimant "*may* ultimately be a candidate for surgical intervention . . . [but] cervical intervention for primarily axial neck pain *is difficult to prognose, and should be a last resort only after exhausting conservative treatment.*" CX 4, CX 18 (italics added). No other physician who has

[10] A second letter dated July 25, 2006, which is typewritten on Dr. Qureshi's letterhead but signed by "Mr. Ruben Perez," similarly states that Claimant is unable to work. CX 12. Mr. Perez is not otherwise identified in the record, and his medical qualifications, if any, are unknown. I thus give it little weight.

treated Claimant since Dr. Broom began treating him in November 2005 has recommended surgery as a course of treatment for Claimant.[11]

Dr. Qureshi's September 12, 2006 letter also erroneously states that Claimant had not, at that time, received any facet joint injections recommended by his orthopedist. The record clearly reflects, however, that Claimant received multiple injections from Dr. Torres including a cervical epidural injection on January 26, 2006, a right selective nerve root injection on February 3, 2006, a trigger point injection on March 9, 2006, and another trigger point injection on March 21, 2006. CX 13.

Given the conclusory nature of Dr. Qureshi's opinion, as well as his erroneous understanding of Claimant's prior medical treatment, I find his opinion is entitled to little weight.

Claimant also asserts that Dr. Webb at the Florida Spine Institute recommended he not do any work. Tr. 112. Indeed, the record does contain two "Return to Work/School Release" forms from the Florida Spine Institute which state that Claimant cannot return to work. The first form, dated June 12, 2006, is signed by Joseph P. Henson, a certified physician's assistant at the Florida Spine Institute. CX 6. The second form, dated August 3, 2006, is signed by Alphonso Fontaine, a certified physician's assistant and doctor of health sciences, also at the Florida Spine Institute. CX 10. However, neither form was signed by Dr. Webb, neither form gives any explanation for the conclusory statements contained therein that Claimant cannot return to work,[12] and there is nothing in either of the two reports of examination by Dr. Webb that supports Claimant's assertion that Dr. Webb believed Claimant was incapable of working.

Claimant was first examined by Dr. Webb on May 30, 2006, and the report of that examination simply notes that Dr. Webb had a lengthy discussion with Claimant about treatment options, that Claimant had been seen by Dr. Broom in March, and that Dr. Webb found Dr. Broom's recommendations for physical therapy "quite appropriate." CX 4. When Dr. Webb next saw Claimant on June 12, 2006, he again discussed with Claimant various treatment options and recommended that Claimant follow up with Dr. Torres "for cervical facet injections for both diagnostic and therapeutic purposes." CX 9. He also noted, as stated above, that surgical intervention "should be a last resort only after exhausting conservative treatment." *Ibid*. Dr. Webb made no mention of any physical restrictions resulting from Claimant's condition, nor did he offer any opinion regarding whether Claimant was able or unable to work. Inasmuch as both Dr. Broom and Dr. Torres had already concluded that Claimant was capable of working with the above-described restrictions,[13] neither the examination reports authored by Dr. Webb, nor the

[11] While Claimant was seen for an consultation in September 2005 by Dr. Campbell, and a fax cover sheet from Dr. Campbell's office dated September 7, 2005 addressed to "Barbara Huss" notes, under "comments" that authorization is being sought for, *inter alia*, "cervical surgery," Dr. Campbell's report does not recommend surgery. Given the fact that both Dr. Broom and Dr. Torres examined and treated Claimant on numerous occasions, I accord their opinions on the need for surgery more weight than the unexplained "request for authorization" for cervical surgery from Dr. Campbell's office.

[12] The first form simply states that Claimant "[c]annot return to work until follow-up with Dr. Torres" (CX 6) and the second that Claimant "[c]annot return to work until follow-up with Dr. Broom." CX 10.

[13] *See, e.g.*, EX 7 (January 13, 2006 letter from Dr. Torres to Carrier in which he states that he has read Dr. Broom's report and agrees with the physical limitations noted therein; June 19, 2006 letter from Employer's counsel to Dr. Torres in which Dr. Torres noted on June 24, 2006 that he concurred with Dr. Broom's restrictions and stated that

forms signed by Joseph Henson and Alphonso Fontaine, support Claimant's assertion that he was unable to return to work.

With respect to Claimant's assertion that he cannot work because of pain, various medical records confirm he has repeatedly complained of pain to the physicians who examined and treated him since his May 2005 injury.[14] However, Drs. Broom and Torres, Claimant's most recent treating physicians, were clearly cognizant of these complaints of pain, yet both physicians determined that Claimant was capable of engaging in gainful employment.

Claimant's counsel also implied in his closing brief, and asserts in the motion to admit pharmacological evidence filed December 27, 2006, that Claimant's medication impairs his ability to work.[15] However, multiple entries in his treatment records reflect that Claimant did not report any adverse effects from his medications and, indeed, benefited from their use.[16] Furthermore, neither the position offered to Claimant by PCL in Orlando, nor any of the positions described in Employer's labor market surveys, require that Claimant operate a motor vehicle or engage in any activity involving the use of machinery which might be deemed inappropriate for someone taking one or more of the medications prescribed for Claimant.[17] Finally, as discussed further below, Drs. Broom and Torres were thoroughly familiar with Claimant's ongoing use of prescribed medications[18] and concluded that, despite his medication regimen and complaints of pain, he was capable of working.

Claimant first requested that he be approved for treatment by Dr. Broom on September 19, 2005. EX 9. On November 7, 2005, Dr. Broom conducted an initial orthopedic evaluation of Claimant during which he obtained relevant medical, family and social histories, conducted a physical examination of Claimant, and noted various symptoms resulting from Claimant's May 9, 2005 accident including pain in his neck, back, head, right ear, and right hand. CX 13. Based on the results of his examination, Dr. Broom prescribed various medications, advised that Claimant avoid surgery, and recommended that he proceed instead with an active physical therapy program with instruction in home exercise. *Ibid*. Dr. Broom also offered a lumbar epidural steroid injection if there was no improvement in Claimant's condition. *Ibid*. With

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"pain management treatment will be palliative in nature and will consist of medication management and possibly facet joint injections to help decrease pain.").

[14] *See, e.g.*, EX 5 (6/9/05 treatment note by Dr. Landman, pain level at 7-8); EX 4 (6/29/05 treatment note by Dr. Lichtblau, neck and low back pain at level 7-8; 8/11/05 treatment note by Dr. Lichtblau, pain between level 8-9); CX 13 (11/7/05 orthopedic evaluation by Dr. Broom, pain level 7-9); CX 14 (12/29/05 evaluation by Dr. Torres, neck pain radiates to both shoulders at level 9-10, severe low back pain), CX 21 (8/31/06 IME by Dr. Weber, "pain is constant, extremely severe, sharp, and stabbing at times . . . ."), EX 7 (9/5/06 treatment note by Dr. Torres, pain level 9).

[15] *See* Claimant's Closing Argument at pp. 6-8; *see also* Motion for Leave to Introduce Pharmacological Evidence at pp. 3-8.

[16] *See, e.g.*, EX 4 (May 23, 2005 follow-up report by Dr. Lichtblau, Claimant using medications as prescribed and not complaining of any adverse reactions; use of medication has had beneficial effect; July 11, 2005 follow-up report by Dr. Lichtblau, Claimant using medication as prescribed and not complaining of any adverse reactions; August 11, 2005 follow-up report by Dr. Lichtblau, same). l

[17] *See* testimony of Jeff Gray at Tr. 122, 124-25; *see also* testimony of Jerry Albert at Tr. 149, 159-60 and EX 1-2.

[18] Claimant was treated by Dr. Broom from November 7, 2005 through June 8, 2006 and by Dr. Torres from December 20, 2005 through September 8, 2006.

respect to physical limitations at the time, Dr. Broom recommended that Claimant avoid repetitive bending, twisting, climbing, overhead work, and lifting over 20 pounds. *Ibid.*

After Dr. Broom obtained MRI's of Claimant's cervical and lumbar spine, he saw Claimant again on December 15, 2005. EX 6. Based on the results of the MRI's, as well as a physical examination which revealed no focal motor or sensory deficits and a normal straight leg raising test, Dr. Broom concluded that Claimant had reached MMI. *Ibid.* He opined that Claimant had a permanent partial disability rating of 5 percent for the cervical spine and 5 percent for the lumbar spine for a total 10 percent permanent partial disability rating. *Ibid.* Dr. Broom imposed permanent restrictions that Claimant avoid repetitive bending, twisting, climbing, and overhead work, as well as lifting over 30 pounds. *Ibid.* He further recommended that Claimant be referred for pain management. *Ibid.*

Pursuant to Dr. Brooms referral, Claimant was seen on December 29, 2005 by Dr. Torres for an initial evaluation regarding pain management. CX 13, EX 7. Dr. Torres obtained relevant medical, family, and social histories, conducted a physical examination of Claimant, reviewed the results of a July 6, 2005 MRI of Claimant's cervical spine, counseled Claimant with respect to his future treatment options, and settled on a treatment plan involving the administration of certain pain medications and a series of three cervical epidural steroid injections, the first of which was given that day. CX 13.

According to a January 13, 2006 letter from Dr. Torres to Zurich American Insurance Company, Claimant had been referred to him by Dr. Broom for a series of cervical epidural steroid injections and Dr. Torres had read, and agreed with, Dr. Broom's recommended physical restrictions and conclusion that Claimant had reached MMI. EX 7.

After his initial examination, Claimant was seen on fourteen more occasions by Dr. Torres between January 10 and August 7, 2006. CX 13. He received a cervical epidural injection on January 26, 2006, a right selective nerve root injection on February 3, 2006, a trigger point injection on March 9, 2006, and another trigger point injection on March 21, 2006. *Ibid.* His pain medication was periodically adjusted by Dr. Torres as needed. *Ibid.*

Claimant was again seen by Dr. Broom on March 9, March 30, and June 8, 2006, at which times Dr. Broom continued to opine that Claimant had reached MMI and was capable of work. CX 13. As a result of the March 30, 2006 visit, Dr. Broom recommended an updated MRI of the cervical and lumbar spine to see if surgical intervention was appropriate. *Ibid.* The MRI's were obtained on April 13, 2006 and interpreted by Marc D. Shapiro, M.D. CX 13, EX 6. On May 4, 2006, Dr. Broom responded to an inquiry from Employer's counsel stating that Claimant was still at MMI and any orthopedic treatment provided to Claimant from that point forward was palliative rather than remedial. EX 6. Dr. Broom subsequently reviewed the results of the April 13, 2006 MRI's with Claimant during an office visit on June 8, 2006, and recommended at that time that he avoid surgery and continue with pain management. CX 13.

The opinions of Drs. Broom and Torres that Claimant could return to work as of December 15, 2006 are rational, documented, and well reasoned. Both physicians found, after reviewing Claimant's MRI's and examining him on multiple occasions, that Claimant was

capable of working with restrictions of no repetitive bending, twisting, climbing, lifting over 30 pounds, and avoiding overhead work. They were clearly aware of Claimant's complaints of pain and his use of prescription medications when they released him to work, yet they concluded that Claimant was physically capable of engaging in gainful employment. Their opinions are unequivocal, supported by the evidentiary record, and, in light of their status as treating physicians, entitled to substantial weight. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6 (2001). I find their assessment of Claimant's functional capacity more credible than any contrary evidence of record, and thus find that Claimant was, considering his age, education, work experience, and physical restrictions, capable of performing the job described in Mr. Gray's September 11, 2006 letter involving traffic and erosion control duties in Orlando, Florida.

Based on the foregoing, I find that Employer has met its burden to establish suitable alternative employment at least as early as September 11, 2006 and that Claimant is thus only partially disabled as a result of his May 9, 2005 injury. Whether Employer has shown the existence of suitable alternative employment which was reasonably available to Claimant prior to that date depends on the weight to be given the testimony and documentation of Employer's vocational expert[19] and Claimant's testimony that he exercised due diligence in attempting to seek and obtain the employment described therein. That evidence is discussed below.

Employer has presented the testimony, vocational assessment, and labor market survey of Jerry Albert in support of its contention that suitable alternative employment is, and was, available to Claimant after his May 9, 2005 accident. Mr. Albert, a practicing vocational rehabilitation counselor for the past 39 years, testified that he initially met with Claimant on April 28, 2006 for 2.1 hours, which included sitting through Claimant's deposition. Tr. 141. Based on the results of his interview, test results, and the physical limitations imposed by Dr. Broom, Mr. Albert prepared a Vocational Evaluation Report dated April 29, 2006 in which he concluded that there were a variety of light and sedentary jobs which Claimant could perform. EX 1.

Even prior to meeting with Claimant, Mr. Albert prepared a labor market survey for the period April 1 through April 14, 2006 in which he identified specific jobs that were available to Claimant within the physical restrictions imposed by Dr. Broom.[20] Tr. 146. When he first identified the jobs listed in the survey, Mr. Albert looked at various employers' web sites on the Internet, identified job openings with a particular company, and then contacted a person in personnel or a supervisor at the company to gather information about the particular job vacancy he had identified. Tr. 149. Job vacancies available during the above-referenced period included: "toll service attendant" with Employment Resources in Orlando at $7.64 per hour;[21]

[19] An employer may rely on the opinion of a vocational rehabilitation expert to demonstrate the availability of suitable alternative employment. *Turney v. Bethleham Steel Corp.*, 17 BRBS 232 , 236 (1985). An administrative law judge may credit a vocational expert's opinion even if the expert did not examine the employee, as long as the expert was aware of the employee's age, education, industrial history, and physical limitations when exploring local job opportunities. *Ibid*.

[20] After it was completed, Mr. Albert forwarded the labor market survey to Claimant's counsel with a cover letter dated April 14, 2006 in which he asked counsel to forward the job information to his client. EX 2.

[21] Mr. Albert learned after meeting with Claimant that Claimant was not a high school graduate, and he thus agreed that the job listed in the labor market survey as a "toll service attendant" was not suitable for Claimant. Tr. 144.

"towers attendant" with Hilton Disney World in Lake Buena Vista at $7.00 per hour; "host" with Hilton Disney World in Lake Buena Vista at $8.05 per hour; "host-Sunset Sams" with Gaylord Palms Resort in Kissimmee at $6.90 per hour; "host" with Caribe Royal Orlando at $7.00 per hour; and "room service worker" with Sheraton Safari in Orlando at $6.40 per hour. EX 2.

The "toll service attendant" position with Employment Resources, as subsequently acknowledged by Mr. Albert (Tr. 146), was not reasonably available to Claimant because, *inter alia*, it required the applicant to be a high school graduate or have a general equivalency degree. Since Claimant attended school in Guatemala for only nine years (Tr. 57), and there is no evidence showing that he ever obtained his GED after immigrating to this country, he clearly does not meet the requirements of this position, and this job is thus not "suitable" as alternative employment. I find, however, that the requirements of the remaining jobs are consistent with Claimant's age, education, work experience, and physical restrictions, and that they are located within the geographical area where Claimant was then residing. Subsequent labor market surveys by Mr. Albert also reflect a variety of job openings in similarly suitable positions for the period July 24, 2006 through September 18, 2006. Since each job listing, as Mr. Albert testified, (Tr. 148-49), is for an actual job opening that was available on the date specified,[22] I further find that Employer has met its burden to show the availability of suitable alternative employment as of April 12, 2006.[23] It thus becomes Claimant's burden to show that he diligently attempted, but failed, to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981).

Claimant testified that he contacted each of the employers listed in the labor market surveys provided to his attorney by Mr. Albert. Tr. 80. He testified that he contacted Employer Resources about the "toll booth attendant" position and they did not hire him because of his physical limitations and because he was not a high school graduate. Tr. 80-81. Claimant further testified he filled out a job application for a job at Hilton Disney World as a "host" but was not hired there "for the same reason, as well, my physical limitations, physical restrictions." Tr. 81. Regarding a job at Sheraton Safari as a "room service worker," Claimant testified:

> I was disapproved. And I was told that no one had contacted them, and that the amount wasn't what they paid, and that was not the specific job they had. So they told me that all of those pages, paperwork was invalid. They refused it. They denied it.

Tr. 81-82. According to Claimant, he was similarly "disapproved" for positions as a "host" at Gaylord Palms Resort and Caribe Royale Orlando. Tr. 82. He further testified, with respect to the job at Caribe Royale Orlando:

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[22] *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985) (while employer need not actually obtain job for its employee, it must establish existence of actual, not theoretical, job openings).

[23] Although the Labor Market Survey indicates it covers the period 4/2/2006 to 4/14/2006, the earliest job opening identified therein is dated 4/12/2006 for a position as a "Room Service Worker" at the Sheraton Safari in Orlando, Florida. EX 2.

> They said to me, "How is it, if you have all of these physical restrictions and you're taking that strong medication, how is it that you could be looking for a job, looking for that job."

Tr. 83. Claimant similarly testified that he was denied jobs at CiCi's Pizza as a "dishwasher," "busboy," and pizza prep person," at Embassy Suites Resort as a "lobby attendant," bus person," and "house person," and at Gaylord Palms Resort as a "kitchen steward," dishwasher," "lobby cleaner," "host," and "house attendant," all because of his physical limitations Tr. 84-86.

Although it is clear to me that Claimant did, in fact, contact some of the employers identified by Mr. Albert in his various labor market surveys, and that he was denied employment by each of those employers, it is also quite clear that Claimant was less than completely candid with these employers about his physical limitations and ability to work. For example, the job listing for a "host" position at Hilton Disney World bears a handwritten notation dated 6/6/06 that Claimant "filled out an employment application at Hilton DW" and identifies the physical requirements of the job as standing 70 percent of the time, walking 30 percent of the time, lifting up to 20 pounds, occasional bending, and frequent reaching. CX 23 at 124. Nothing in the physical requirements of the job is inconsistent with the physical limitations imposed by Dr. Broom of avoiding repetitive bending, twisting, climbing, lifting over 30 pounds, and avoiding overhead work. Furthermore, the job does not require any prior experience, nor does it require a high school education or GED, and the applicant need only be 18 years of age or older. Nothing in the job description or the notations appearing thereon supports Claimant's assertion that he was denied employment because of his physical limitations.

Another job listing from Mr. Albert's labor market survey, this one for a "host" position at Caribe Royal Orlando, bears a handwritten note dated June 5, 2006 stating that "[p]hysical limitations prohibits [sic] standing for long periods of time." CX 23 at 126. However, neither Dr. Broom nor Dr. Torres placed any limitation on Claimant's ability to stand, and it thus appears that Claimant simply informed the person with whom he spoke that he could not stand for "long periods of time." The handwritten notation on the job listing for a "room service worker" at the Sheraton Safari stating that "[p]osition required bending/twisting," CX 23 at 127, similarly appears to be a result of Claimant's self-imposed limitation inasmuch as Dr. Broom's restrictions did not prohibit all bending and twisting but simply prohibited "repetitive" bending and twisting.

While it appears that Claimant was legitimately denied employment on two occasions because he did not meet the requirements of the positions,[24] requirements of the remaining job listings in Employer's labor market surveys are all, on their face, consistent with Claimant's age, education, work experience, and physical restrictions. Despite this fact, Claimant testified that none of the employers in the labor market surveys would hire him because of his physical

[24] In addition to lacking the qualifications for the "toll booth attendant" position, a handwritten notation on the job listing for a "host-Sunset Sams" position at Gaylord Palms Resort indicates that the applicant "needs customer service exp." CX 23 at 125. This requirement is not noted in the listing prepared by Mr. Albert, and I will accept Claimant's representation that he was not hired for this job because he lacked that experience.

limitations. I find Claimant's testimony regarding the reason he was denied employment with these employers is not credible.[25]

In contrast to Claimant's testimony, I find the testimony of Employer's vocational expert regarding the availability of jobs for Claimant is credible, that the jobs listed in Mr. Albert's labor market surveys are actual jobs which are consistent with Claimants age, education, work experience, and physical restrictions, and that these are jobs which Claimant could have secured between April 1 and September 18, 2006 if he had diligently tried. Mr. Albert has been a vocational counselor and evaluator for the past 39 years, has testified in various Longshore proceedings in the past as an expert witness, and, since September 1983, has been the President and Owner of Associated Rehabilitation Clinic, Inc. in Jacksonville, Florida where he and his staff engage in, *inter alia*, vocational testing and counseling, medical management, and job placement of clients seeking employment. Tr. 140; EX 2. In response to questions asked of him by Claimant's counsel, Mr. Albert acknowledged that they had met before, testified that he had "great respect" for counsel, and noted that they had previously "cooperate[d] with one another." Tr. 154-55.

With respect to this case, Mr. Albert testified that he contacted each of the prospective employers listed in his labor market survey after having identified potential job vacancies with those employers via the Internet. Tr. 149. The job listings he subsequently included in the labor market surveys identified each individual with whom he spoke, described the requirements of the available jobs, and listed the hours and rates of pay. *Ibid*. During his conversations with these prospective employers, he expressly advised them of Claimant's physical limitations, told them that he spoke only Spanish, and informed them that he was on medication. *Ibid*. Mr. Albert further testified that he followed up with various employers after generating his labor market surveys to determine whether Claimant had contacted them and whether jobs were still available.

[25] My observations of Claimant during the course of the hearing and my review of the record as a whole lead me to believe that Claimant is simply not a credible witness. For example, although Claimant testified that his ability to speak and understand English is limited just to his "personal information," Tr. 99, he frequently appeared to understand, and respond to, questions posed to him during the hearing by counsel before those questions were translated from English to Spanish by the interpreter. Additionally, Jeff Gray testified that he does not speak Spanish and neither he nor any of Claimant's supervisors had any trouble communicating with Claimant while he was employed at PCL. Tr. 117-18. Similarly, Mr. Gray testified that the PCL safety officer, who does not speak Spanish and who conducted the investigation of Claimant's accident, was on-site when Claimant was injured on May 9, 2005 and had no problem conversing with Claimant and obtaining from him an accurate description of what happened. Tr. 133. It is thus apparent that Claimant misrepresented his ability to speak and comprehend English. Likewise, Claimant's description of his office visits with Dr. Broom are simply not credible. For example, he testified he never saw Dr. Broom in December 2005 and March and June 2006 but instead was seen only by someone named "Robert" who would come into the examination room, sit down, and then leave the room after handing Claimant a yellow piece of paper without ever asking him how he felt or where he hurt. Tr. 68-71. He also testified that Dr. Broom's records from November 7, 2005 through June 8, 2006 reflect "complaints, updates and examinations" which were simply made up, Dr. Broom never discussed the results of Claimant's April 13, 2006 MRI with him during his June 8, 2006 office visit, and no one in Dr. Broom's office would speak to him. Tr. 96-98. Finally, Mr. Albert credibly testified that during the course of his vocational testing and evaluation of Claimant, Claimant appeared to intentionally rush through the Raven Progressive Matrices, taking only 9 minutes and 33 seconds while most individuals took at least 30 minutes, and consequently Mr. Albert did not believe Claimant's score accurately reflected his abilities. Tr. 142-43. Mr. Albert similarly testified that he thought Claimant should have scored higher on the Bennett Mechanical Comprehension test based on his prior work experience. Tr. 143. It is thus apparent that Claimant intentionally minimized his abilities during the vocational assessment process.

Tr. 152. For example, he testified that the person with whom he spoke at the Gaylord Palms Resort after preparing the July labor market survey was too busy to check on whether Claimant had submitted an application, but confirmed that the resort continued to have job openings. *Ibid*. Mr. Albert further testified, regarding the August labor market survey, that the manager at the Hotties Gourmet Donut store in Lake Buena Vista looked through

> a lot of applications going back a long period of time, several months into the past, and he could not identify a[n] . . . application from [Claimant]. But he noted that there did continue to be openings there.

Tr. 152. According to Mr. Albert, he also spoke with the manager at CiCi's Pizza in Lake Buena Vista in September, and the manager

> shared with me that an individual did come in. He spoke English. He applied for work, and showed him a bunch of physician papers, showing that he could only lift ten pounds, that he could not recall his name, and he did not recall if [Claimant] had submitted an application.

Ibid. The manager further told Mr. Albert that there were several positions available there including jobs as a "pizza prep person," a "busboy," and a "dishwasher." *Ibid*.

As noted above, the testimony and documentation of Mr. Albert satisfies Employer's burden to establish the existence of suitable alternative employment. Mr. Albert's testimony also demonstrates that various jobs listed in his labor market surveys remained open and unfilled *after* Claimant allegedly attempted to seek employment by those employers. I find Claimant's testimony regarding his job search efforts is not credible, and I thus further find he has failed to establish that he exercised due diligence in attempting to seek and obtain employment consistent with his age, education, work experience, and physical restrictions.

Wage Earning Capacity

Once suitable alternate employment is shown, a claimant's disability is deemed to be partial rather than total. *SGS Control Services v. Director, OWCP,* 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP,* 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Sections 8(c)(21) and (e) of the Act provide that an award for partial disability shall be based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §§ 908(c)(21) and (e). Earnings established for the alternate employment show the claimant's wage-earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The ultimate objective of the "wage-earning capacity formula is 'to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured.'" *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 795, 16 BRBS 56, 61 (CRT) (D.C. Cir. 1984) (*quoting* 2 Larson, THE LAW OF WORKMEN'S COMPENSATION § 57.21, at 10-101 to 10-102 (1982)). The testimony of a vocational expert, as to what work the claimant can perform with his disability and what wages would be paid for this work, will often be

determinative on this issue. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979).

According to Mr. Albert, the salaries for the jobs listed in the labor market surveys ranged from a low of $276.00 per week at $6.90 per hour up to $320.00 per week at $8.00 per hour. Tr. 153. A review of the labor market surveys done by Mr. Albert between April and September 2006 actually reflect a salary for the jobs listed therein ranging from a low of $6.40 per hour for 40 hours per week to a high of $8.05 per hour for 40 hours per week. EX 2. Based on this salary range, Claimant could have earned at least $256.00 per week up to a maximum of $322.00 per week. The average of these two extremes is $289.00, and I find this amount is a reasonable approximation of Claimant's wage earning capacity from April 2006 to September 2006 when he was offered employment at PCL. I further find, however, that Claimant's wage earning capacity as of September 11, 2006 increased from $289.00 per week to $400.00 per week based on the PCL job offer of that date extended to Claimant by Jeff Gray for work in Orlando, Florida.

As noted above, the parties have stipulated that Claimant's average weekly wage at the time of his May 9, 2005 work-related accident was $844.00. Therefore, based on the testimony of Mr. Albert and the jobs identified in Employer's labor market survey, I find that, during the period April 14, 2006 until September 11, 2006, Claimant suffered a loss in his wage earning capacity of $555.00.[26] I further find that Claimant's loss in wage earning capacity beginning September 11, 2006 was $444.00.[27] Claimant was thus entitled to permanent partial disability compensation at a rate of $370.00 per week from April 14, 2006 to September 10, 2006 and $296.00 per week thereafter.

As also noted above, the parties have stipulated that Claimant was paid temporary total disability compensation for 47 weeks from May 10, 2005 to April 4, 2006 at a rate of $526.95 per week for a total of $24,766.65 plus penalties and interest. They have further stipulated that Claimant was paid temporary partial disability compensation for his lost wage earning capacity for 22 weeks from April 5, 2006 to September 5, 2006 at a rate of $206.93 per week for a total of $4,552.46 plus penalties and interest. Therefore, Claimant is entitled to the difference in compensation from that paid by Employer for partial disability ($206.93 per week for the period April 14, 2006 through September 5, 2006) and the amounts of compensation set forth above, as well as continuing payments of permanent partial disability compensation at a rate of $296.00 thereafter.

One final note with respect to Claimant's entitlement to compensation. Employer and Claimant have stipulated, as noted previously, that Claimant's AWW was $844.00 and that he was thus entitled to temporary total disability compensation at a rate of $526.95. *See* Tr. at 22, ALJ 3, EX 2. However, the appropriate compensation rate based on this AWW is $562.66, not $526.95, *i.e.*, $844.00 times 66 2/3 percent = $562.66. Claimant is therefore entitled to the difference in these two compensation rates from the date of his work-related injury on May 9, 2005 until April 14, 2006 when Employer first demonstrated the availability of suitable alternative employment.

[26] $844.00 AWW less $289.00 per week wage earning capacity = $555.00 lost wage earning capacity.
[27] $844.00 AWW less $400.00 per week wage earning capacity = $444.00 lost wage earning capacity.

Medical Treatment and Expenses

Claimant asserts that he no longer has any faith in Dr. Broom's ability to treat him for the injuries he sustained while working for PCL, and he seeks authorization for treatment by, and reimbursement for expenses paid to, Dr. Scott A. Webb at the Florida Spine Institute. *See* Claimant's Closing Argument at pp. 8-11. He further seeks authorization for physical therapy prescribed by Dr. Ihan Rodriguez in Kissimmee, Florida, pain management, including cervical facet injections, by Dr. Jose A. Torres, a consultation with and treatment by a neurologist and/or neurosurgeon as recommended by Drs. Imtiaz Qureshi and David Campbell, and a consultation with and treatment by a urologist as recommended by Drs. Lichtblau, Torres, and Webb. *Ibid*.

Employer notes that Claimant's counsel "has stipulated that the Claimant has already exercised three first free choices of physicians," and that Claimant has now received authorized medical treatment for his injuries from Drs. Lichtblau, Landman, Broom, and Torres. Employer's Closing Argument at pp. 4-6. It thus argues that he is not entitled to change physicians without Employer's approval absent a showing of good cause for such a change. *Ibid*.

Applicable regulations provide, in relevant part:

> Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the deputy commissioner. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

20 C.F.R. § 702.406(a). Clearly, Claimant here has made not only one, but three, "initial, free choice[s] of an attending physician." Drs. Lichtblau, Landman and Broom are all orthopedic specialists and their services have been "necessary for, and appropriate to, the proper care and treatment of [Claimant's compensable injur[ies] . . . ." The only reason given by Claimant regarding the need for a change in treating physicians is that he has "lost confidence" in Dr. Broom and wants, instead, to be treated by Dr. Webb at the Florida Spine Institute. CX 3. At the hearing, Claimant testified that he had little or no interaction with Dr. Broom and instead was seen by someone named "Robert" who did not talk to him and simply gave him a yellow piece of paper with a date for his next office visit. Tr. 68-72. He also testified that the complaints, updates, and examinations reflected in Dr. Broom's records were made up, Dr. Broom never discussed with him the results of his MRI's, and he never made any recommendations regarding further treatment. Tr. 96-97.

For the reasons noted previously, I find Claimant's testimony regarding his treatment by Dr. Broom is not credible. I further find that the treatment provided by Dr. Broom, including his referral to, and treatment by, Dr. Torres for pain management, are appropriate considering the

nature and extent of Claimant's work-related injuries. I therefore find that Claimant has failed to demonstrate good cause for a change of physicians. Since Claimant has failed to demonstrate good cause for a change of physicians, and since he was not authorized by Employer to be treated either by Dr. Qureshi or by Dr. Webb, I further find that Claimant is not entitled to recover any expenses related thereto.

With respect to Claimant's request that Employer be ordered to provide authorization for him to receive prescribed treatment and consultations as recommended by one or more of his treating physicians, I note that Employer's counsel stipulated at the formal hearing that Claimant is authorized to receive injections and pain management by Dr. Torres and that, to the extent either Dr. Broom or Dr. Torres recommended physical therapy, that too was authorized. Tr. 29-30, 32. To the extent Employer has not yet authorized, or agreed to pay for, any other treatment, consultation, or test previously ordered by one of Claimant's authorized treating physicians for his work-related injuries, it is hereby directed to do so.

IV. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making a claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills. . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985).

ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, IT IS HEREBY ORDERED that:

1. Employer and Carrier shall pay Claimant compensation at a rate of $526.95 per week for temporary total disability from May 9, 2005 through December 14, 2005, and permanent total disability from December 15, 2005 through April 13, 2006.

2. Employer and Carrier shall thereafter pay Claimant compensation for permanent partial disability from April 14, 2006 to September 10, 2006 at a rate of $370.00 per week and at a rate of $296.00 per week thereafter.

3. Employer and Carrier shall be entitled to a credit against any liability imposed herein for all compensation previously paid by them to Claimant relating to his May 9, 2005 injuries.

4. Interest shall be paid on all accrued benefits at the T-Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rates shall be determined as of the filing date of this Decision and Order with the District Director.

5. The district director shall perform all calculations necessary to effect this order.

6. Employer and Carrier shall provide all medical care deemed to be necessary and appropriate by Claimant's authorized treating physicians.

7. Any petition for the allowance of attorney fees and costs must be prepared on a line item basis and in compliance with 20 C.F.R. § 702.132 and must be filed within 20 days after the service of this Decision and Order. Should a fee petition be filed, any objection shall be on a line item basis, stating the reasons for the objection, with explanation, and shall be filed within 10 days after receipt of the fee petition. Any item not objected to as directed shall be deemed without objection, and allowed. Within 10 days after receipt of any objection, Claimant's counsel may file a line item response.

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STEPHEN L. PURCELL
Associate Chief Judge

Washington, D.C.